IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO.44 OF 2006

Shree Vaishnavi Land Developers,
A partnership firm registered under
Partnership Act, with Registrar of
Bombay, represented by its Partner,
Shri Vinayak Mayekar, son of
Purushottam Shrinivas Mayekar,
Aged 43 yeaers, resident of
Manguesh, Altinho, Panaji, Goa. ..... Appellant.

V/s.

1. Ms. Alina Leonildes Tereza
Rodrigues Fernandes, E-245,
Rua De Ourem, Panaji, Goa.

2. Ms. Maria Tecla,
R/o. E-245,
Rua De Ourem, Panaji, Goa.

3. Mr. Martiniano Jesus Francisco
De Souza, Jyoti Apartments,
Makapura Road, Baroda,

4. Mrs. Lucy Eva De Souza,
Jyoti Apartments,
Makapura Road, Baroda,

5. Mrs. Livette Maria Cleleste
De Souza, 1730, Cemetery
Road, Palarivattam,
Ernakulam, Kerala.

6. Mr. John Mootekar Lazare
Titus, 1730, Cemetery Road,
Palarivattam,
Ernakulam, Kerala.

7. Dr. Abelio Belizario Jose de
Souza, E-245, Rua De Ourem,
Panaji, Goa.

8. Ms. Arlette Elfrida Opolina
De Souza and her husband,

9. Marcus Leoncio Braganza
P.O. Box No.522,
Dubai, U.A.E.

10. Mrs. Carlota Perpetua Evelisa
De Souza E Silveira,
Silveira Mansion,
St. Inez, Panaji, Goa.

11. Jose Vasco Rebelo Da
Silveira, Silveira Mansion,
St. Inez, Panaji, Goa.

12. Ms. Liana Purificacai Martin
e Souza
E-245, Rua De Ourem,
Panaji, Goa.

13. Mr. Alvito Ciril Jose Rodrigues,
Fernandes, Denmark,

14. Mrs. Ingelise Fernandes,
Denmark. ..... Respondents.

Mr. Sudin M. S. Usgaonkar, Advocate for the appellant.

Mr. A.N.S. Nadkarni, Advocate for the respondents.

CORAM : SMT. RANJANA P. DESAI, J.

Date of reserving the Order :
7th July, 2006.

Date of pronouncing the Order :
17th July, 2006.

O R D E R :

In this appeal, the original plaintiff in Special Civil Suit No.4/06/A has challenged order dated 25.5.06, passed by the Civil Judge, Sr. Division, Mapusa. By the impugned order, the application for temporary injunction filed by the plaintiff is rejected.

2. The facts, which led to the filing of the suit, as stated in the plaint, may be shortly stated :

The property known as "Malim" situated at Village Malim of Penha de Franca, Taluka Bardez is owned by the respondents who are the original plaintiffs (`the said property', for short). By agreement of sale dated 20.5.2000, executed by defendants 1 and 2 as constituted attorneys of the other defendants, the defendants agreed to sell a part of the said property to M/s. Vidyut Real Estate Private Limited (`Vidyut', for short), represented by its Director for a consideration of Rs.7,16,78,400/-. It is the plaintiff's case that an amount of Rs.25,00,000/- was paid by Vidyut and the balance was to be paid in installments as per the said agreement.

3. As per clause 12 of the said agreement, the defendants had agreed to execute conveyance of the sub-divided plots in favour of such persons to be nominated by Vidut and as per clause 13, they had undertaken to execute an irrevocable power of attorney in favour of Vidyut to represent the defendants before all authorities.

In pursuance of clause 13, on 20.5.2000, defendants 1 and 2 as constituted attorneys of the defendants, executed special power of attorneys in favour of Sudin Pai Kane, the Managing Director of Vidyut.

4. The plaintiff's case is that the plaintiff had evinced interest in developing and in purchasing part of the said property. Accordingly, Vidyut executed a Memorandum of Understanding (MOU) dated 12.4.04 with the plaintiff agreeing to sell and develop a part of the said property for consideration of Rs.2,62,56,000/-. According to the plaintiff, an amount of Rs.1,00,000/- was paid as earnest money by the plaintiff to Vidyut. The said MOU was executed before Notary Advocate Mrs. Medhekar. Thereafter, the plaintiff issued a public notice in daily Navhind Times dated 13.6.04 informing the public about the said agreement and inviting objections from the public. It is the plaintiff's case that no objections were received from the public to the said notice.

5. According to the plaintiff, the plaintiff had informed Vidyut that the plaintiff desired to have a meeting with the owners, i.e. the defendants and Vidyut agreed to arrange a meeting for the purpose of executing the conveyance which the defendants were required to execute. As one year elapsed in the process of completing the formalities connected with the proposed purchase,

the plaintiff desired to once again publish a notice of the intended purchase and accordingly, a notice was published in the Navhind Times on 1.5.05. As Vidyut did not arrange a meeting with the owners, the plaintiff decided to verify whether the power of attorney executed by the co-owners in favour of defendant 1 still subsisted. According to the plaintiff, they addressed notice dated 2.5.05 to all the defendants seeking their confirmation. It is the plaintiff's case that none of the defendants who received the notice responded to the same.

6. According to the plaintiff, the plaintiff managed to contact defendant 7. Defendant 7 informed the plaintiff that he is representative of all the defendants and in particular of defendant 1 who does not move out on account of her old age.

7. According to the plaintiff, in the last week of August, 2005, the plaintiff and defendant 7 had a meeting. Defendant 1 represented to the plaintiff that other defendants had informed that although the agreement was executed by Vidyut with co-owners, Vidyut had failed in its commitments of paying the consideration, in time and hence, the defendants did not desire to deal with Vidyut and the said agreement was treated as cancelled.

8. The plaintiff's further case is that defendant 7 agreed to deal with the plaintiff directly provided Vidyut was kept out of the deal. As the agreement of Vidyut was not legally terminated, the plaintiff instructed the defendants to publish a notice to put on record that the agreement with Vidyut has been terminated. According to the plaintiff, defendant 7 suggested that they would publish notice stating that they had not executed any agreement with Vidyut and that as the notice was being published at the instance of the plaintiff, the cost thereof would have to be borne by the plaintiff. As the defendants had agreed to deal directly with the plaintiff, the plaintiff did not object to the nature of the public notice. But the plaintiff told the defendants that to protect their interest they would formally respond to the said notice by writing a letter of clarification bringing on record the MOU with Vidyut and seeking clarification thereof. The plaintiff agreed to bear the cost of the notice. According to the plaintiff, the defendants agreed to the suggestion of the plaintiff and an amount of Rs.5,00,000/- was paid in cash to defendant 7 as part payment of the total consideration and the same was received by defendant 7 for himself and on behalf of the other defendants. As per the said agreement between the plaintiff and the defendants, a notice was handed over to the plaintiff signed by defendant No.1 on behalf of the other defendants along with a NOC dated 7.9.05 to publish the said notice. Accordingly,

the plaintiff got the said notice published in two news papers dated 10.9.05 through their agent and paid the charges thereof.

9. It is the case of the plaintiff that as per the said agreement, the plaintiff through their Advocate responded to the said public notice of the defendants, addressed to defendant 1 by letter dated 22.9.05 bringing on record the fact of MOU with Vidyut and sought clarification of the real position from defendant 1. In response to the said letter, defendant 1 wrote a letter dated 30.9.05 giving detailed account of all the events.

10. It is the case of the plaintiff that as the agreement between the defendants and Vidyut was not formally terminated and the defendants wanted to be out of the deal, the defendants requested the plaintiff to formally get the rights of Vidyut transferred to themselves to deal smoothly with the plaintiff without any hindrance from Vidyut. Accordingly, Vidyut executed an agreement of surrender dated 13.9.05 formally surrendering its right under the Agreement dated 20.5.2000 in favour of the plaintiff. Vidyut also sworn in an affidavit and also gave a power of attorney in favour of the plaintiff and all these documents were executed before Notary advocate. It is the case of the plaintiff that the said documents were shown by the plaintiff to the defendants and upon seeing them, the defendants agreed to execute conveyance in favour of the plaintiffs.

A copy of the draft deed of sale was prepared by the plaintiff and given to the defendants for approval informing that the plaintiff was ready with funds and the deed can be signed at any time. Defendant 7 received the draft of the deed of sale and informed that all the defendants are not available and that the deed of sale be executed on 26.1.06 and the plaintiff agreed for the same. According to the plaintiff, the contract between the plaintiff and the defendants to purchase and sell the suit property was, thus, concluded. The plaintiff agreed for execution of conveyance in January, 2006. The plaintiff was surprised on reading notice published by Advocate Naik in the Navhind Times dated 12.1.06 informing that her clients are interested to buy the suit property from the defendants. The plaintiff's case is that the plaintiff has always been ready and willing to perform its part of the agreement and any action on the part of the defendants to sell the suit property to a third party amounts to breach of the contract. The plaintiff, accordingly, replied to the notice of Advocate Naik. On. 23.1.06, the plaintiff read a public notice in daily Navhind Times signed by the defendants in response to the public notice of the plaintiff as well as reply given to Advocate Naik. According to the plaintiff, although it had concluded contract with the defendants, by issuing public notice dated 23.1.06, the defendants have made their intention clear of committing breach of the said contract with the plaintiff. The plaintiff, therefore, filed the

instant suit alleging that it had been ready and willing and still ready and willing to perform its part of the contract by paying the agreed consideration and that the defendants be directed to specifically perform the contract by signing deed of sale conveying the suit property to the plaintiff for consideration of Rs.10,00,00,000/-.

11. The defendants denied the case of the plaintiff. According to them, there is no privity of contract between the plaintiff and the defendants and no concluded contract is disclosed. The defendants' case is that all the power of attorneys, MOU and the agreement of surrender are fabricated documents. The plaintiff is guilty of fraud and hence, it is not entitled for equitable relief. The defendants denied execution of any agreement with Vidyut. The defendants denied the existence of power of attorneys. According to them, their signatures are forged. According to the defendants, subject-matter of the agreement of surrender i.e. the land admeasuring 32,820 sq. metres is valued at more than Rs.10,00,00,000/- and, therefore, it is inconceivable that the defendants would sell it for Rs.1,00,00,000/-. Fraud has been practised on the defendants.

12. The learned judge dismissed the application of the plaintiff, inter alia, on the ground that there is no concluded contract and, therefore, there is no question of specific performance thereof.

She was, therefore, of the view that the plaintiff is not entitled to any interim order.

13. Mr. Usgaonkar, learned counsel for the plaintiff assailed the impugned order on several counts. He submitted that the plaintiff has relied upon several documents. According to the plaintiff, there was an agreement between the defendants who were represented by their attorney, defendant 1 and Vidyut to sell the suit property for a consideration of Rs.7,16,78,400/-. Simultaneously, a power of attorney was given by the defendants to Vidyut in pursuance of clause 13 of the said agreement. Clause 7 of the power of attorney authorised Vidyut to assign all the rights of the defendants under the said agreement in favour of any third party. The said agreement as well as the said power of attorney were executed before a Notary. Mr. Usgaonkar contended that as per Section 85 of the Indian Evidence Act, a power of attorney executed before a Notary is presumed to be correctly executed. Mr. Usgaonkar pointed out that in pursuance of clause 7 of the power of attorney permitting assignment, the plaintiff executed a MOU with Vidyut, agreeing to develop and purchase a part from the said property for a consideration of Rs.2,62,56,000/-, out of which Rs.1,00,000/- was paid upon execution of the MOU and Rs.1,47,69,000/- was payable at the time of execution of formal detailed joint venture agreement to be executed and the balance amount of Rs.1,14,87,000/- was to

be paid by way of developed plots. A public notice dated 3.6.04 as well as another public notice dated 30.4.05 were published in the news paper by the plaintiff expressing plaintiff's intention to purchase the suit property from the defendants through Vidyut. There was no reaction from the defendants to this public notice. Thereafter, individual notices were sent to the defendants. But they were received by only five of them. They did not respond to the said notices. In August, 2005, there were meetings directly between the plaintiff and defendant 7 who was acting on behalf of defendant 1. Thereafter, as agreed between the plaintiff and the defendants, a public notice was issued by defendant 1 at the plaintiff's cost. In response to the letter of the plaintiff, defendant 1 admitted meetings with the plaintiff in August, 2005. Mr. Usgaonkar contended that all these facts clearly prove that there were dealings between the defendants and Vidyut.

14. Mr. Usgaonkar submitted that the defendants are alleging fraud. It is their case that the signatures of the defendants on the agreement and the power of attorneys have been forged. The defendants have produced report of handwriting expert to show that defendant 1 had not signed the said agreement and power of attorney. Mr. Usgaonkar contended that this can only be decided after the evidence is led. Till the Court decides whether there is a

fraud or not, presumption under Section 85 of the Evidence Act will come to the help of the plaintiff and all the documents must be presumed to be genuine.

15. Mr. Usgaonkar contended that the conduct of the defendants demonstrates that they were fully aware of the agreement with Vidyut. Except writing a letter dated 30.9.06, disowning deal with Vidyut, no action either civil or criminal was taken by the defendants against Vidyut for the alleged fraud. Mr. Usgaonkar contended that two letters, one dated 11.10.05 and the other dated 13.12.05 addressed by defendant 1 to public authorities in the matter of development of the suit property falsifies the case of the defendants that there were no dealings between them and the plaintiff. He submitted that the said two letters of October, and December, 2005 clearly show a concluded contract. He submitted that the material produced by the plaintiff discloses a strong prima facie case in favour of the plaintiff. A triable issue is raised which needs adjudication at the trial and the subject-matter needs to be protected by directing maintenance of status quo. Mr. Usgaonkar submitted that the defendants cannot take advantage of the fact that Vidyut was not made a party to the suit because vis-a-vs the plaintiff Vidyut is neither a necessary party, nor a proper party. Mr. Usgaonkar contended that the authorities cited by the defendants

have no application to the present case. He submitted that irreparable harm will be caused to the plaintiff if interim relief is not granted.

16. Mr. Nadkarni, learned counsel for the defendants, on the other hand, submitted that Vidyut is a necessary party because the plaintiff claims to have derived title from Vidyut. The fact that Vidyut is not made a party reflects on the credibility of the plaintiff's case and an adverse inference has to be drawn against the plaintiff. He submitted that it is alleged by the plaintiff that some amount has been paid over to the defendants. However, the plaintiff has not produced any document to show that any money has been received by the defendants. Mr. Nadkarni pointed out that the plaintiff has alleged negotiations only with defendant 7. But, defendant 7 had no authority to deal with the property. He submitted that all the documents on which reliance is placed are fabricated documents and in a complaint lodged by the defendants, the police have got the signatures examined by the handwriting expert and the handwriting expert has opined that the signatures of defendant 1, who is an old lady, are forged. Mr. Nadkarni contended that the property is worth more than Rs.15,00,00,000/-. It is inconceivable that the owners would agree to sell such a property for a paltry sum of Rs.1,00,00,000/-. In support of his

submissions, Mr. Nadkarni relied on ***Ganesh Shet v. C.S.G.K. Setty and ors., (1998) 5 SCC 381*** and ***Kilburn Engineering v. Oil and Natural Gas Ltd. and anr. AIR 2000 Bombay 405.*** Mr. Nadkarni contended that the plaintiff has suppressed the material facts and has not come to the Court with clean hands and, therefore, no interference is necessary with the impugned order.

17. The case of the plaintiff is that the defendants agreed to sell the said property to Vidyut by Agreement of Sale dated 20.5.2000 and under clause 12 they agreed to execute conveyance of the sub-divided plots in favour of person/s nominated by Vidyut. It is stated that the defendants had executed irrevocable power of attorney in favour of Vidyut to do all necessary acts and they had executed a special power of attorney in favour of the Managing Director of Vidyut. The plaintiff claims that Vidyut entered into a MOU with them agreeing to sell and develop a part of the property and some amount was paid by the plaintiff to Vidyut. Then it is the case of plaintiff that defendant 7 told them that Vidyut had failed to carry out its commitment. The agreement with Vidyut is said to have been cancelled and according to the plaintiff, defendant 7 agreed to deal with the plaintiff directly. Thereafter, Vidyut is said to have surrendered its rights by Agreement dated 13.9.05. The rights were surrendered according to the plaintiff in its favour. Vidyut then gave

a power of attorney in favour of the plaintiff. After seeing all these documents, according to the plaintiff, the defendants agreed to execute conveyance in favour of the plaintiff. It is apparent, therefore, that Vidyut has played a very major role in all these transactions. Vidyut would have thrown a lot of light on the controversy and if the plaintiff's case was true, Vidyut would have strengthened it. But the plaintiff has not made Vidyut a party. In my prima facie opinion, an adverse inference needs to be drawn against the plaintiff. Non-impleadment of Vidyut is explained by the plaintiff by saying that Vidyut is not a necessary or a proper party as the plaintiff has no cause of action against Vidyut. This stand makes a further dent in the plaintiff's case and it is totally evasive.

18. According to the plaintiff, some amount has been paid to the defendants. It is pertinent to note that there is not a single document on record to establish that any amount has been paid to the defendants. It is inconceivable that if any amount was paid to the defendants, the plaintiff would not insist on receipts.

19. In a suit for specific performance of a contract, concluded contract must be spelt out from the pleadings. The plaint is very

confusing. A concluded contract is hard to find. Perhaps an oral contract is pleaded. But the averments do not give any idea about the oral contract. Paragraphs 26 of the plaint reads thus :

> " The said documents were shown by the plaintiff to the defendant and upon seeing the same, the defendant agreed to execute conveyance in favour of the plaintiff. A copy of the draft of the deed of sale was prepared by the plaintiff and given to the defendant for approval, informing that the plaintiffs is ready with the funds and the deed can be signed any time."

It is not understood to which documents the plaintiff is referring and to which defendant the said documents were shown and which defendant agreed to execute conveyance in favour of the plaintiff. The learned Judge cannot be faulted for having taken a view that there is no concluded contract between the parties.

20. The plaintiff claims that the plaintiff has dealt with defendant No.7. The property is owned by all the defendants. Defendant 7 is not authorised by them to deal with the property and if at all the plaintiff had any dealings with defendant 7, in my prima facie opinion, they cannot bind the other defendants.

21. It is an admitted position that the plaintiff does not have any agreement with all the defendants. The plaintiff has relied on

several power of attorneys, notarized before a Notary. The plaintiff has relied on MOU, and an agreement under which Vidyut had surrendered its rights. But all these documents are notarised documents. Reliance is placed on presumption under Section 85 of the Evidence Act. It is pointed out to me that in the criminal proceedings, the police have got the signatures of defendant 1 examined from handwriting expert and the handwriting expert has opined that the signatures of defendant 1 on the documents, in question, are forged. Whether or not this is true will, obviously, be decided after the criminal case is over. But, at this stage, the court would undoubtedly consider this circumstance as one of the many circumstances relevant for considering whether the plaintiff is entitled to the relief or not.

22. Prima facie I find substance in the submission of Mr. Nadkarni that it is inconceivable that the defendants would agree to sell the property at such a low price when, admittedly, it is worth several crores. The plaintiff has placed strong reliance on MOU dated 12.4.04 and the agreement of surrender of rights dated 13.9.05. Both these documents are executed between the plaintiff and Vidyut. The plaintiff claims that they have acquired rights in the property through Vidyut. The defendants, however, are not parties to these documents. Therefore, there is no privity of contract

between the plaintiff and the defendants. Even the alleged agreement dated 20.5.2000 is between the defendants and Vidyut to which the plaintiff is not a party. Therefore, the plaintiff is precluded in law from enforcing such agreement against the defendants.

23. Since so far as agreements dated 20.5.2000, 12.4.2004 and 13.9.2005 are concerned there is no privity of contract between the plaintiff and the defendants, specific performance thereof, in my prima facie opinion, cannot be asked for. So far as the alleged oral contract is concerned, the averments are extremely vague. From the alleged negotiations which are also not very clear, oral concluded contract cannot be inferred. There is no indication as to what were the terms and conditions or consideration of the said oral contract.

24. In this connection, reliance placed by the defendants on the judgment of the Supreme Court on ***Ganesh Shet's*** case (supra) is apt. In that case, the Supreme Court has held that in a case for specific performance, the evidence and the proof of agreement must be absolutely clear and certain and in the absence of the same, there is no concluded contract between the parties and the court should not exercise its power of granting discretionary relief. A reference may also be made to ***Kilburn Engineering's*** case (supra) on which

the plaintiff has placed reliance. In that case, this Court has held that a contract is built upon three components as three pillars i.e. certainty, commitment and communication, and if any of the three components is lacking either in the offer or acceptance, there cannot be a valid contract. In the present case, it is rightly contended by the defendants that there is neither certainty nor commitment nor communication. It is, therefore, difficult to hold that there is a concluded contract between the plaintiff and the defendants.

25. In the circumstances of the case, therefore, in my opinion, since the plaintiff has failed to make out a prima facie case, the trial Court has rightly rejected the application of the plaintiff. I am of the view that the interest of justice would be served if I pass the following order :

The appeal from order is rejected. However, if the defendants decide to create any third party rights in the suit property or sell the suit property, they shall inform the intending purchaser/s or concerned persons about the pendency of the present litigation. They shall inform the intending purchaser/s or the concerned persons that the sale or any transaction in respect of the suit property will be subject to the judgment that may be passed in the present suit.

It is clarified that this Court has not expressed any final opinion on the merits of the case.

The suit is expedited and the trial Court is directed to hear and dispose of the suit as expeditiously as possible and at any rate within a period of one and half years.

SMT. RANJANA P. DESAI, J.

ssm